**ORAL ARGUMENT NOT YET SCHEDULED**

**No. 14-1225**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**NATURAL RESOURCES DEFENSE COUNCIL, INC.,**
***Petitioner*,**

**v.**

**U.S. NUCLEAR REGULATORY COMMISSION and**
**THE UNITED STATES OF AMERICA,**
***Respondents*,**

**and**

**EXELON GENERATION COMPANY, LLC,**
***Intervenor.***

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**ON PETITION FOR REVIEW OF AN ORDER BY**
**THE UNITED STATES NUCLEAR REGULATORY COMMISSION**

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# BRIEF OF INTERVENOR EXELON GENERATION COMPANY, LLC

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May 7, 2015

## CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES, AND RULE 26.1 DISCLOSURE

Pursuant to D.C. Circuit Rules 26.1 and 28(a)(1), counsel for Intervenor certifies as follows:

### 1. Parties, Intervenors, and *Amici*

The petitioner is Natural Resources Defense Council, Inc. ("NRDC"). The respondents are the United States Nuclear Regulatory Commission ("NRC") and the United States of America. Intervenor on behalf of respondents is Exelon Generation Company, LLC. There are no *amici*.

### RULE 26.1 DISCLOSURE STATEMENT

Intervenor Exelon Generation Company, LLC states that it is a Pennsylvania limited liability company and a wholly owned subsidiary of Exelon Ventures Company, LLC, which in turn is a wholly owned subsidiary of Exelon Corporation. No other publicly held company has a 10% or greater ownership interest in the Exelon Generation Company, LLC, Exelon Ventures Company, LLC or Exelon Corporation.

### 2. Rulings Under Review

NRDC's petition for review references the following NRC orders:

a. *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-12-19, 76 NRC 377 (2012);

b. *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-13-07, 78 NRC 199 (2013);

c. *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), LBP-14-15 (Oct. 7, 2014); and

d. NRC's orders issuing renewed facility operating license numbers NPF-39 and NPF-85 to Exelon Generation Co., LLC for Limerick Generating Station Units 1 and 2.

**3. Related Cases**

This Court's case no. 13-1311 (*NRDC v. NRC*) presented the same merits issues as the instant case. The Court dismissed case no. 13-1311 as moot on November 13, 2014, after NRDC filed its petition for review in the instant case.

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# GLOSSARY

| | |
|---|---|
| AEA | Atomic Energy Act of 1954, as amended |
| AEC | Atomic Energy Commission |
| APA | Administrative Procedure Act |
| EIS | Environmental Impact Statement |
| Limerick | Limerick Generating Station, Units 1 and 2 |
| NEPA | National Environmental Policy Act |
| NRC | U.S. Nuclear Regulatory Commission |
| NRDC | Natural Resources Defense Council, Inc. |
| SAMA | Severe Accident Mitigation Alternative |
| SAMDA | Severe Accident Mitigation Design Alternative |
| UCS | Union of Concerned Scientists (case name) |

## STATEMENT OF JURISDICTION

Exelon concurs with, and incorporates, the jurisdictional statement of the Respondents.

## STATEMENT OF THE ISSUES

1. Whether the Nuclear Regulatory Commission ("NRC" or "Commission") acted arbitrarily and capriciously by requiring the Natural Resources Defense Council ("NRDC") to seek a waiver of the rule at 10 C.F.R. § 51.53(c)(3)(ii)(L), which provides that if the NRC staff has previously considered a severe accident mitigation alternatives ("SAMA") analysis for a particular site – as it has for the Limerick Generating Stations, Units 1 and 2 ("Limerick") – then an applicant for a renewed operating license for that site need not perform another SAMA analysis to satisfy the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 to 4370(h).

2. Whether the NRC acted arbitrarily and capriciously by holding that NRDC failed to meet the Commission's strict standards for waiver of a regulation in 10 C.F.R. § 2.335(b), which has long been applied to require, among other things, circumstances "unique to the facility," in order to overcome the heavy presumption against adjudicating matters resolved by the agency through rulemaking.

## STATUTES AND REGULATIONS

All statutes and regulations cited herein are contained in the addenda to the Petitioner's and Respondents' briefs.

## STATEMENT OF THE CASE

This case concerns NRDC's challenge to the NRC's denial of NRDC's petition for a waiver of 10 C.F.R. § 51.53(c)(3)(ii)(L) and, thus, NRDC's request to litigate its SAMA-related contention in the license renewal adjudicatory proceeding for Exelon's Limerick nuclear power station in Pennsylvania.[1] By its terms, section 51.53(c)(3)(ii)(L) exempts Exelon from including a site-specific SAMA analysis in the Limerick Environmental Report, because the NRC previously considered severe accident mitigation design alternatives ("SAMDAs")[2] in the 1989 Final Environmental Statement supporting the NRC's issuance of the initial Limerick operating licenses.[3]

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1 *See Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-13-7, 78 NRC 199 (2013) (JA374) ("CLI-13-7").

2 The NRC uses the terms SAMDA and SAMA to refer to severe accident mitigation measures considered at the initial plant design/licensing and license renewal phases, respectively.

3 *See generally* Exelon Generation Company, LLC, Applicant's Environmental Report – Operating License Renewal Stage, Limerick Generating Station, Units 1 and 2 (June 22, 2011), http://pbadupws.nrc.gov/docs/ML1117/ML11179A104.pdf ("Environmental Report"); U.S. Nuclear Regulatory Commission, Office of Nuclear Reactor Regulation, Final Environmental Statement Related to the Operation of Limerick Generating

In CLI-13-7, the Commission explained that for Limerick and certain other plants, "the SAMA issue has been resolved by rule, which means that the issue has been carved out from adjudication."[4] Therefore, the Commission held, to litigate a SAMA-related contention in this and other adjudicatory proceedings for similarly situated plants, a petitioner must obtain a waiver of the applicable rule by meeting the "stringent" requirements in 10 C.F.R. § 2.335(b),[5] which was a "substantial burden, but not an impossible one."[6]

The Commission concluded that NRDC, despite being given the opportunity to do so, failed to overcome that hurdle. The Commission found that, pursuant to standards that have remained "virtually unchanged" since 1972, NRDC had failed to demonstrate that its claims were "unique" to Limerick.[7] Rather, NRDC's claims all involved some manifestation of the "passage of time," which would apply equally to any other plant that, like Limerick, had a preexisting SAMA analysis.[8] Accordingly, the Commission found that NRDC's requested waiver would "swallow the rule" and affirmed the Licensing Board's denial of NRDC's waiver

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Station, Units 1 and 2, NUREG-0974 Supplement (Aug. 1989), http://pbadupws.nrc.gov/docs/ML1122/ML11221A204.pdf.

4 *Limerick*, CLI-13-7, 78 NRC at 211-12 (JA388) (internal quotation marks and citation omitted).

5 *Id.* at 207 (JA381).

6 *Id.* at 208 (JA382-83) (internal citation omitted).

7 *Id.* at 207, 216 (JA382, 391).

8 *Id.* at 214 (JA394).

petition.[9] The Commission nevertheless referred NRDC's waiver petition to the NRC staff as "additional comments" on the Limerick draft supplemental EIS for the staff's consideration and response.[10]

NRDC here challenges the Commission's denial of its waiver petition, primarily upon the basis of its argument that no waiver was required, and upon the assertion that "the Commission *must* provide a hearing to [a petitioner] raising a NEPA-related issue material to the agency's decision-making." NRDC Br. 25 (emphasis added). NRDC claims that no waiver was required because the SAMA analysis exception codified in section 51.53(c)(3)(ii)(L) is "limited." NRDC Br. 35. Specifically, it asserts that section 51.53(c)(3)(ii)(L) requires that the applicant analyze SAMAs even where they already have been considered by the NRC, but that such analysis is limited to "new and significant information" bearing on the adequacy of the previous analysis. NRDC Br. 34. Further, according to NRDC, a petitioner is "entitled" to a hearing on the adequacy of that consideration. NRDC Br. 34. In the alternative, NRDC argues that, even if a waiver is required, the Commission's failure to find such a waiver in these circumstances was arbitrary and capricious. *See* NRDC Br. 39-46. Lastly, NRDC claims that if the

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9 *Id.* at 215, 217 (JA393, 396).

10 *Id.* at 216-17 (JA395). Contrary to NRDC's suggestion (NRDC Br. 25, 35), the Commission did not deem the information presented in NRDC's waiver petition to be "new and significant."

Court concludes that section 51.53(c)(3)(ii)(L) bars a hearing, and NRDC is not entitled to a waiver, then the Court also must find that the Commission's "regulatory scheme" violates NRDC's hearing "rights" under the Atomic Energy Act of 1954, as amended ("AEA"),[11] NEPA, and the Administrative Procedure Act ("APA").[12] NRDC Br. 47-50.

## STATEMENT OF FACTS

### I. STATUTORY AND REGULATORY BACKGROUND

In 1989, the NRC staff conducted a site-specific SAMDA analysis as part of its review of Limerick's operating license application, in response to a remand by the U.S. Court of Appeals for the Third Circuit that same year.[13] The court had invalidated a Commission policy statement that would have precluded the consideration of SAMDAs at the operating license stage. It found that the policy statement was not a sufficient vehicle to preclude the consideration of SAMDAs, and held that the Commission must give them "'the careful consideration and disclosure required by NEPA.'"[14]

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11 42 U.S.C. §§ 2011 to 2297h-13.

12 *See* 5 U.S.C. §§ 701 to 706.

13 *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 741 (3d Cir. 1989).

14 *Id.* at 736-37, 739 (quoting *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 98 (1983)).

Later, as part of its 1996 rulemaking to amend the NRC's NEPA-implementing regulations in 10 C.F.R. Part 51, the Commission determined as a general matter that severe accident mitigation would be addressed on a site-specific basis – subject, as noted below, to an important qualification explicitly made applicable here.[15] In particular, the Part 51 amendments codified impact findings for certain "Category 1" environmental issues that generically apply to all plants or a subset of plants.[16] Environmental impacts that may differ among plants and thus require a plant-specific analysis were designated "Category 2" issues and must be addressed in an applicant's environmental report.[17] NRC regulations also require the applicant's environmental report to address any "new and significant information."[18] The NRC prepares a plant-specific supplement to the generic EIS that adopts applicable generic impact findings (Category 1), discusses site-specific impacts (Category 2), and evaluates any new and significant information.[19]

With respect to severe accident impacts themselves, the NRC's Generic EIS for license renewal provides an evaluation that applies to all U.S. nuclear power

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15 Final Rule: Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 28,467, 28,480-82 (June 5, 1996) ("Part 51 Rulemaking") (JA589, 602-04).

16 *See id.* at 28,474 (JA589-90, 596); 10 C.F.R. § 51.53(c)(3)(i).

17 *See* Part 51 Rulemaking, 61 Fed. Reg. 28,474; 10 C.F.R. § 51.53(c)(3)(ii).

18 10 C.F.R. § 51.53(c)(3)(iv).

19 *Id.* § 51.95(c).

plants.[20] Based on that evaluation, Part 51 concludes that the "probability weighted consequences … of severe accidents are *small* for all plants."[21] Thus, a plant-specific analysis of severe accident impacts is not required in individual license renewal proceedings.[22] With respect to mitigation alternatives, however, the Commission designated the SAMA analysis as a "Category 2" issue, noting that it could not reach a generic conclusion regarding mitigation alternatives because all licensees had not completed certain severe accident mitigation evaluations required by the NRC under 10 C.F.R. Part 50.[23]

The Commission has emphasized that "[t]he SAMA analysis is not a safety review performed under the Atomic Energy Act."[24] As such, the mitigation

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[20] *See* Generic Environmental Impact Statement for License Renewal of Nuclear Plants—Main Report (Final Report), NUREG-1437, Vol. 1 at 5-12 to 5-116 (May 1996), http://pbadupws.nrc.gov/docs/ML0406/ML040690705.html (JA480-584).

[21] 10 C.F.R. pt. 51, subpt. A, app. B, tbl. B-1 (Postulated Accidents; Severe accidents) (emphasis added).

[22] *See Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 316 (2010) ("NRC SAMA analyses are not a substitute for, and do not represent, the NRC NEPA analysis of potential impacts of severe accidents.").

[23] Part 51 Rulemaking, 61 Fed. Reg. at 28,480-81 (JA602-03).

[24] *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-1, 75 NRC 39, 57 (2012); *see also Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 431 (2003) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989)) ("Under NEPA, mitigation (and the SAMA issue is one of mitigation) need only be discussed in 'sufficient detail to ensure that

measures assessed in a NEPA SAMA analysis are "supplemental" to those it already requires under its safety regulations for reasonable assurance of safe operation, and also supplemental to those that it may require under its ongoing regulatory oversight over reactor safety, pursuant to the AEA.[25] That oversight includes, for example, the NRC's post-Fukushima comprehensive safety review, which includes a review of the requirements and guidance associated with accident mitigation measures.[26]

Importantly for purposes of this appeal, the Commission provided an exception in section 51.53(c)(3)(ii)(L), the regulation at issue here, for plants (including Limerick) for which the NRC already had conducted a severe accident mitigation analysis. That regulation states that "severe accident mitigation alternatives need not be reconsidered for these plants for license renewal."[27] As discussed in the 1996 Part 51 Rulemaking, this codified exception to the license renewal SAMA analysis requirement reflects the NRC's reliance on previous technical analyses, including (1) the Containment Performance Improvement program (which evaluated potential failure modes, potential plant improvements,

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environmental consequences [of the proposed project] have been fairly evaluated.'").

25 *Pilgrim*, CLI-12-1, 75 NRC at 57.

26 *Id.*

27 Part 51 Rulemaking, 61 Fed. Reg. at 28,481 (JA603).

and the cost-effectiveness of such improvements); (2) plant-specific SAMDA analyses for the Limerick, Comanche Peak, and Watts Bar plants that were performed as part of the initial licensing of those plants; (3) individual plant examinations to look for plant vulnerabilities to internally initiated events;[28] and (4) separate individual plant examinations for externally initiated events.[29] The Commission noted that these examinations considered potential improvements to

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[28] *See* Part 51 Rulemaking, 61 Fed. Reg. at 28,481-82 (JA603-04). The Limerick probabilistic risk assessment model has been regularly updated to reflect as-built and as-operated plant conditions. Environmental Report at 5-6. Exelon reviewed the current model to identify any new information relative to the quantification of risk (measured in core damage events per year, or core damage frequency) in comparison to information provided in the 1989 SAMDA analysis. That review indicated that the core damage frequency has *decreased* by nearly an order of magnitude since 1989. This reduction is attributed to more reliable data, improvements in procedural guidance and plant capabilities, fewer reactor trips, and implementing the individual plant examinations, Accident Management, and Containment Improvement Performance programs. *Id.* (JA603-04).

[29] In 1995, Limerick submitted to the NRC a plant-specific examination for externally initiated events to identify vulnerabilities to severe accidents and to report the results, along with any licensee-determined improvements. That examination resulted in five improvements at Limerick, including one design change. *See* NUREG-1742, Perspectives Gained from the Individual Plant Examination of External Events (IPEEE) Program, Final Report, vol. 1 at 3-8 (tbl. 3.3) (Apr. 2002), http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1742/ (noting two operational procedures improvements, two maintenance procedures improvements, and one physical design change for Limerick).

reduce the risk of severe accidents on a plant-specific basis and "essentially constitute a broad search for severe accident mitigation alternatives."[30]

In view of these previous studies, the NRC concluded in 1996 that site-specific SAMA analyses were "unlikely [to] identify major plant design changes or modifications that will prove to be cost-beneficial for reducing severe accident frequency or consequences."[31] Thus, with respect to the Limerick, Comanche Peak, and Watts Bar plants in particular, the NRC explicitly determined that an additional site-specific analysis of SAMAs is not required as part of license renewal for those plants.[32]

## II. THE PROCEEDINGS BELOW

The NRC's initial brief presents the relevant procedural history, *see* NRC Br. 3-19, which Exelon incorporates by reference. In brief, Exelon did not include in the Limerick Environmental Report a SAMA analysis to support license renewal. Exelon did evaluate, as required by section 51.53(c)(3)(iv), whether there was any new and significant information that would affect the SAMA analysis

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30 Part 51 Rulemaking, 61 Fed. Reg. at 28,481 (JA603).

31 *Id.* (noting that if SAMA reviews identify any changes as being cost-beneficial, "such changes generally would be procedural and programmatic fixes, with any hardware changes being only minor in nature and few in number").

32 *Id.*

prepared to support the station's initial operating licenses.[33] Exelon did not identify any new and significant information related to SAMAs.[34]

In support of its contentions, NRDC argued that Exelon must consider mitigation measures identified in more recent SAMA analyses for other Mark II boiling water reactors and other reactor designs. NRDC also asserted that Exelon must use Limerick-specific economic cost information rather than economic cost data derived from the Three Mile Island license renewal SAMA analysis.

Exelon addressed the substance of both of these NRDC claims during the proceedings below, demonstrating that NRDC had presented no new and significant information related to the consideration of severe accident mitigation alternatives for Limerick. With regard to the first issue, Exelon's technical experts reviewed all of the approximately fifty SAMAs identified by NRDC (including those for Mark II plants), and confirmed that they involved only procedural and programmatic changes or minor plant modifications.[35] They further determined, through a quantitative analysis, that implementing those same SAMAs at Limerick would not achieve any significant reduction in severe accident risk.[36] As

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33 *See* Environmental Report at 5-4 to 5-9 (JA632-37).

34 *See id.* at 5-9 (JA637).

35 *See* Exelon's Counter Affidavit Supporting Exelon's Response Opposing NRDC's Petition for Waiver of 10 C.F.R. § 51.53(c)(3)(ii)(L), at ¶¶ 13-18 & Table A (Dec. 14, 2012) (JA262-64, 274-76).

36 *See id.* at ¶¶ 20-26 (JA264-68).

documented in the NRC's 2014 Final Supplemental EIS for the Limerick license renewal, the NRC staff independently concluded that "there were no SAMAs identified at other plants with Mark II containments that were determined to be 'new and significant' at Limerick."[37]

As for the second issue, the administrative record shows that there was a reasoned basis for the use of the Three Mile Island data. In particular, the 1989 SAMDA analysis calculated the benefit of each proposed SAMDA based on a reduction of the estimated off-site radiation dose risk (known as "person-rem").[38] However, the resulting benefit value did not account for possible reduction in land contamination from a severe accident or the associated economic cost reduction (as is now typically done in a SAMA analysis). Therefore, Exelon evaluated the potential significance of off-site economic cost risk in its Environmental Report.[39]

In an exercise of considered engineering judgment, Exelon determined that the off-site economic cost of a severe accident at Limerick could be estimated using information from license renewal applications for other nuclear plants in Pennsylvania. In particular, Exelon looked to Three Mile Island Unit 1, another

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37 *See* Generic Environmental Impact Statement for License Renewal of Nuclear Power Plants Regarding Limerick Generating Station, Units 1 and 2, Final Report, NUREG-1437, Supplement 49 at 5-20 to 5-21 (Aug. 2014) ("Final Supplemental EIS") (JA694-95).

38 *See* Environmental Report at 5-4 to 5-8 (JA632-36).

39 *See id.* at 5-8 (JA636).

Exelon plant located in Pennsylvania for which a SAMA analysis was completed in 2008, to obtain a value of about 70 percent (i.e., the off-site *economic* cost risk was approximately 70 percent larger than the off-site *exposure* cost risk).[40] Using that value, Exelon determined that accounting for off-site economic cost risk did not result in the identification of additional cost-beneficial SAMAs for Limerick.[41]

As further documented in its 2014 Final Supplemental EIS, the NRC staff reviewed Exelon's calculation and assumptions and also performed supplemental technical analysis of the off-site economic cost risk issue.[42] The staff concluded that Exelon's method for accounting for off-site economic cost risk was reasonable and consistent with methods and conclusions discussed in the NRC's license renewal generic EIS.[43]

As the foregoing suggests, the NRC's Final Supplemental EIS contains an extensive discussion of potential new and significant information relevant to severe

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40 *See id.* As noted by Exelon in the proceedings below, the various economic cost ratios cited by NRDC for other plants yielded a median economic cost ratio of 48.2 percent, and an average ratio of 60.8 percent. Thus, the data cited by NRDC's experts confirm the reasonableness of the 70% cost ratio used in the Limerick Environmental Report. *See* Exelon's Brief in Support of the Appeal of LBP-12-08 at 25-26 (Apr. 16, 2012) (JA177-78).

41 *See* Environmental Report at 5-8 (JA636).

42 *See* Final Supplemental EIS, vol. 1 at 5-13 to 5-15 (JA687-89).

43 *See id.* at 5-15 (JA689).

accident mitigation at Limerick.[44] That discussion includes consideration of the information presented in NRDC's waiver petition.[45] Based on its review of NRDC's waiver petition and other information, the NRC staff found no new and significant information concerning severe accident mitigation at Limerick.[46]

## SUMMARY OF ARGUMENT

Section 51.53(c)(3)(ii)(L) of the NRC's regulations, by its plain terms, exempts Exelon from including in the Limerick Environmental Report for license renewal a site-specific SAMA analysis, because the NRC previously considered SAMAs in the Final Environmental Statement supporting issuance of the initial Limerick operating licenses. Indeed, the rulemaking preamble for that regulation explicitly identifies Limerick as one of the plants for which a SAMA analysis need not be performed for license renewal.[47]

The Commission's determination (made in CLI-12-19) that NRDC Contention 1-E was inadmissible because it impermissibly challenged the rule at

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44 *See generally id.* at 5-3 to 5-26 (JA677-700).

45 *See id.* at 5-2, 5-10 to 5-11, 5-13 to 5-15, 5-20 to 5-23 (JA676, 684-85, 687-89, 694-97) (addressing issues raised by NRDC in its waiver petition related to cost-effective SAMAs identified at other plants, off-site economic cost risk, and changes in SAMA analysis methodology); *see also* Final Supplemental EIS, vol. 2, app. A at A-123, A-131 (JA704, 712) (noting NRC's consideration of issues raised in NRDC waiver petition as public comments on the draft supplemental EIS per the Commission's directive in CLI-13-7).

46 *See id.*, vol. 1 at 5-24 to 5-25 (JA698-99).

47 Part 51 Rulemaking, 61 Fed. Reg. at 28,481 (JA603).

section 51.53(c)(3)(ii)(L) was eminently correct, and was certainly not arbitrary and capricious.[48] The NRC correctly reasoned that "the exception in section 51.53(c)(3)(ii)(L) operates as the functional equivalent of a Category 1 issue, removing SAMAs from litigation in this, as well as certain other, case-by-case license renewal adjudications."[49] Because it is the functional equivalent of a Category 1 issue, litigation of any associated "new and significant information" also is precluded absent a waiver of the rule.[50] Therefore, the Commission held, NRDC must obtain a waiver of section 51.53(c)(3)(ii)(L) in order to litigate any claims of alleged "new and significant information" related to the Limerick SAMA analysis. The regulatory history of section 51.53(c)(3)(ii)(L) as well as NRC and judicial precedent confirm the reasonableness of those conclusions.

With respect to a possible waiver under section 2.335(b) to allow adjudication notwithstanding the rule, the Commission's conclusion that NRDC failed to justify such a waiver also was eminently correct, and, again, was certainly

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48 *See Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-12-19, 76 NRC 377 (2012) (JA213).

49 *Id.* at 386 (JA225); *see also Limerick*, CLI-13-7, 78 NRC at 212 n.66 (JA388) (stating that "[l]icense renewal applicants whose facilities qualify for the SAMA-analysis exception are exempt from addressing severe accident mitigation in their environmental reports, just as they would be exempt from addressing Category 1 issues," and comparing section 51.53(c)(3)(i) with section 51.53(c)(3)(ii)(L)).

50 *See Limerick*, CLI-13-7, 78 NRC at 211-12 (JA387-88) (citing *Limerick*, CLI-12-19, 76 NRC at 386).

not arbitrary and capricious. Based on the record, the Commission reasonably found that NRDC had failed to present any issues "unique" to Limerick that would justify a case-specific waiver of section 51.53(c)(3)(ii)(L).[51] Consequently, the Commission acted well within its discretion when it "decline[d] to set aside the rule based merely on a *claim* [by NRDC] of new and significant information."[52]

The Commission's determinations in this case are in no way inconsistent with the agency's consideration of any *actual* "new and significant information" under NEPA.[53] As explained in CLI-13-7, there are multiple other, non-adjudicatory channels through which the NRC may receive and assess potentially new and significant information, including public comments on the draft supplemental EIS. NEPA requires nothing more.

The NRC's actions here comport with well-settled principles of administrative law. The NRC's authority to resolve NEPA issues generically by rule rather than through individual licensing adjudication is unquestionable.[54] Also, "it is hornbook administrative law that an agency need not – indeed should

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[51] *Limerick*, CLI-13-7, 78 NRC at 216-17 (JA394-95).

[52] *Id.* at 216 (JA395) (emphasis added).

[53] *Id.* at 216-17 (JA395-96) ("[W]e recognize the NRC's continuing duty to take a 'hard look' at new and significant information, and "expect that the Staff will incorporate any new SAMA-related information that it finds to be significant in the final supplemental EIS.").

[54] *See Balt. Gas & Elec. Co.*, 462 U.S. at 101 (generic analysis "is clearly an appropriate method of conducting the hard look required by NEPA").

not – entertain a challenge to a regulation, adopted pursuant to notice and comment, in an adjudication or licensing proceeding."[55]

A central thrust of NRDC's argument is that the NRC has "stripped" it of an alleged "right" to a hearing on a material issue, and judicial review thereof, in violation of the AEA, NEPA, and APA. NRDC Br. 25-26. But, no such automatic "right" exists, as even *Union of Concerned Scientists v. NRC*, 735 F.2d 1437 (D.C. Cir. 1984) ("*UCS I*"), upon which NRDC chiefly relies, confirms.[56] And, numerous other decisions of this and other Courts of Appeal have specifically held that the AEA "does not confer the automatic right of intervention upon anyone."[57]

At the end of the day, the facts that dictate the denial of NRDC's petition here are simple: the circumstances were addressed by rule, NRDC was offered the chance to seek a waiver of the applicable rule, but NRDC failed to satisfy the applicable waiver standard. The Commission's determinations to that effect were not arbitrary and capricious, and should be affirmed. Indeed, the Commission lawfully applied its own environmental regulations and hearing rules. Insofar as NRDC wishes to challenge those regulations and rules, its recourse lies in a petition for rulemaking, which it chose not to file. This Court's review of a plant-

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55 *Tribune Co. v. FCC*, 133 F.3d 61, 68 (D.C. Cir. 1998) (citations omitted).

56 *See UCS I*, 735 F.2d at 1449 (the "only central requirement" is the *opportunity* for a hearing).

57 *See BPI v. AEC*, 502 F.2d 424, 428 (D.C. Cir. 1974); *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 55 (D.C. Cir. 1990) ("*UCS II*") (quoting *BPI*).

specific adjudicatory decision is not the proper forum for reexamining the NRC's "regulatory scheme," much less declaring it "invalid." NRDC Br. 49.

## ARGUMENT

As explained by the NRC at pages 26-29 of its brief, this Court's review of the decision at issue is highly deferential to the NRC. In reviewing NRC's interpretations of its own rules, the Court gives "controlling weight" to the agency's constructions unless they are "plainly erroneous or inconsistent with the regulation."[58] Furthermore, "in determining what constitutes significant new information, a reviewing court owes considerable deference to the agency's determination because that is a factual question requiring technical expertise."[59]

### I. THE NRC DID NOT ACT ARBITRARILY OR CAPRICIOUSLY IN FINDING THAT NRDC'S PROPOSED SAMA CONTENTION, IN THE ABSENCE OF A WAIVER, WAS AN IMPERMISSIBLE COLLATERAL ATTACK ON AN NRC REGULATION.

NRDC principally seeks review of NRC orders CLI-12-19, in which the Commission remanded to the Board review of a waiver petition to be filed by NRDC, and CLI-13-7, in which the Commission found that NRDC's petition failed to justify a waiver of section 51.53(c)(3)(ii)(L). NRDC Br. 1. Despite the

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[58] *Blue Ridge Envtl. Def. League v. NRC*, 716 F.3d 183, 195 (D.C. Cir. 2013) (quoting *City of Idaho Falls, Idaho v. FERC*, 629 F.3d 222, 228 (D.C. Cir. 2011)).

[59] *Massachusetts v. NRC*, 708 F.3d 63, 73 (1st Cir. 2013) (quoting *Town of Winthrop v. FAA*, 535 F.3d 1, 4 (1st Cir. 2008) (internal quotation marks omitted).

regulation's unambiguous language, NRDC claims that section 51.53(c)(3)(ii)(L) is somehow unclear in its effect (NRDC Br. 34), and that NRC's interpretation of that regulation creates "irreconcilable" conflicts with the AEA and NEPA. NRDC Br. 37. NRDC argues that the NRC erred when it "ruled that *no party* may obtain a hearing on the adequacy of the Commission's consideration of new and significant information concerning SAMAs." NRDC Br. 32. As explained further below, however, NRDC mischaracterizes the controlling facts and legal principles, and has not established arbitrary and capricious action by the NRC.

### A. *Section 51.53(c)(3)(ii)(L) Unquestionably Exempts Exelon from Submitting Another SAMA Analysis.*

The text of section 51.53(c)(3)(ii)(L) does not present the ambiguity upon which NRDC's arguments depend. The rule plainly states that, for license renewal, a SAMA analysis is required only "[i]f the staff has not previously considered severe accident mitigation alternatives for the applicant's plant in an environmental impact statement or related supplement or in an environmental assessment."[60] The meaning and intent of the regulation are clear on its face,[61] and there is no plausible way to construe the regulation to require a new analysis if the staff *has* "previously considered" a SAMA analysis. To do so would be to

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[60] 10 C.F.R. § 51.53(c)(3)(ii)(L).

[61] *See Pfizer Inc. v. Heckler*, 735 F.2d 1502, 1506 (D.C. Cir. 1984) (noting a court's "construction of [an agency] regulation must begin with the words in the regulation and their plain meaning").

impermissibly read the "not" right out of the regulation. This Court's "deference to an agency's interpretation of its regulation is required 'unless an alternative reading is compelled by the regulation's plain language or by other indications of the [agency's] intent at the time of the regulation's promulgation.'"[62]

### B. *The Regulatory History of Section 51.53(c)(3)(ii)(L) Confirms the Rule's Sound Technical Basis and Intended Effect.*

As the Commission recognized, "[e]xempting certain applicants from providing a SAMA analysis at the license renewal stage is certainly the intended effect of the rule."[63] Nonetheless, the Commission decided to "look further" at the "underlying purpose" of the rule, as described in the preamble supporting the rule.[64] The Commission confirmed that section 51.53(c)(3)(ii)(L) codifies the NRC's informed technical and policy determination "that one SAMA analysis would uncover most cost-beneficial measures to mitigate both the risk and the effects of severe accidents, thus satisfying [its] obligations under NEPA."[65] As

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62 *Nat'l Envtl. Dev. Ass'n Clean Air Project v. EPA*, 752 F.3d 999, 1008 (D.C. Cir. 2014) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)) (other citations omitted).

63 *Limerick*, CLI-13-7, 78 NRC at 209 (JA385).

64 *Id*.

65 *Id.* at 210 (JA386). *Cf. Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1330 (D.C. Cir. 2004) (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989)) (stating that EIS supplementation is required only when the action "will affect the quality of the environment 'in a significant manner or to a significant extent not already considered'").

described above (see pages 6-13), an extensive record and a host of considerations supported that conclusion.

### C. *The Commission's Decision Is Consistent with NEPA.*

Contrary to NRDC's claims, the NRC did not eschew NEPA's mandate to consider new and significant information. *See* NRDC Br. 29-30, 37. Nor does that NEPA mandate create an ambiguity or conflict with the agency's Part 51 regulations.

First, the NRC "is entrusted with the responsibility of considering the various modes of scientific evaluation and theory and choosing the one appropriate for the given circumstances."[66] "The requisite 'hard look' does not require adherence to a particular analytic protocol,"[67] and most certainly does not require a hearing. Nor does it require that "the 'state of the art' of a scientific discipline be explicitly discussed in an EIS," especially where such discussion would not enhance the agency's evaluation of environmental impacts or related mitigation measures.[68] Here, the Commission found that NRDC, through reference to alternative cost data and analysis techniques, failed to demonstrate a potentially

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66 *Sierra Club v. U.S. Dep't of Transp.*, 753 F.2d 120, 129 (D.C. Cir. 1985).

67 *Ass'n of Pub. Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1188 (9th Cir. 1997).

68 *Nat'l Indian Youth Council v. Andrus*, 501 F. Supp. 649, 668 (D.N.M. 1980) (citing 42 U.S.C. § 4332(2)(C)).

significant deficiency in the Limerick SAMA analysis; i.e., "a deficiency that credibly could render the SAMA analysis unreasonable under NEPA standards."[69]

Second, the Commission directed the NRC staff to evaluate whether any of the information presented in NRDC's waiver petition is new and significant – which the staff did in its Final Supplemental EIS for Limerick.[70] Thus, the NRC has considered the very information that NRDC alleges it has not.

Accordingly, the record, and the process and reasoning provided by the NRC, demonstrate that NEPA's "hard look" requirement was plainly met.[71]

### D. *The Commission's Decision Is Consistent with NRC and Judicial Precedent.*

In CLI-12-19, the Commission applied its own controlling precedent – as affirmed by the First Circuit – in concluding that generic rulemaking can remove SAMAs from litigation in certain cases, even where "new and significant information" is alleged.[72] As the Commission explained, in the *Vermont Yankee* and *Pilgrim* license renewal proceedings, it "resolved a similar issue concerning

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69 *Limerick*, CLI-13-7, 78 NRC at 215-16 (JA394) (quoting *Pilgrim*, CLI-12-1, 75 NRC at 57).

70 *See id.* at 216-17 (JA395-96).

71 *See Hughes River Watershed Conservancy v. Johnson*, 165 F.3d 283, 288 (4th Cir. 1999) (citing *Marsh*, 490 U.S. at 378-85) (listing obtaining opinions from experts, giving scientific scrutiny, and offering responses to legitimate concerns as evidence of a sufficiently "hard look"); *Massachusetts v. NRC*, 708 F.3d at 78 (same).

72 *Limerick*, CLI-12-19, 76 NRC at 386 (JA224-25).

the interplay between two subsections of 51.53(c)(3) and, particularly, whether purported new and significant information could be litigated in an adjudicatory proceeding absent a waiver."[73]

The Commission's decision there stemmed from its review of a proposed contention that challenged a "Category 1" (i.e., generic) issue.[74] The petitioners in both proceedings filed similar contentions to those filed here, arguing that new and significant information rendered the generic EIS analysis of the impacts of spent fuel pool storage inadequate, such that the applicants must discuss the issue in their environmental reports.[75]

In a consolidated decision, the Commission upheld the *Vermont Yankee* and *Pilgrim* Licensing Boards' rejection of the contentions as an improper challenge to section 51.53(c)(3)(i).[76] It found that "the new and significant information requirement in [section] 51.53(c)(3)(iv) did not override, for the purposes of

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[73] *Id.* at 383-84 (JA221) (citing *Entergy Nuclear Vermont Yankee, LLC, & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station; Pilgrim Nuclear Power Station), CLI-07-3, 65 NRC 13, 16 (2007), *reconsideration denied*, CLI-07-13, 65 NRC 211 (2007), *aff'd sub nom.*, *Massachusetts v. NRC*, 522 F.3d 115 (1st Cir. 2008) ("*Vermont Yankee* and *Pilgrim*")).

[74] *See id.* at 384 (JA221) (citing CLI-07-3, 65 NRC at 16-17).

[75] *See id.* (citing CLI-07-3, 65 NRC at 18-19).

[76] *See id.* (citing CLI-07-3, 65 NRC at 20) ("Fundamentally, any contention on a 'Category 1' issue amounts to a challenge to our regulation that bars challenges to generic environmental findings.").

litigating the issues in an adjudicatory proceeding, the exclusion of Category 1 issues in [section] 51.53(c)(3)(i) from site-specific review."[77] Consequently, the Commission determined that a waiver was required to litigate any new and significant information relating to a Category 1 issue, and affirmed the Boards' rejection of the petitioners' contentions given the lack of a waiver request.[78]

The First Circuit denied the petitions for review of the NRC's decision, citing the courts' "substantial deference" to the NRC's interpretation of its own rules.[79] The court of appeals stated that "[t]he NRC's procedural rules are clear: generic Category 1 issues cannot be litigated in individual licensing adjudications without a waiver."[80] Absent a waiver, any petitioner wishing to "attack the agency's rule" on such an issue "must petition for a generic rulemaking."[81]

Importantly, the First Circuit emphasized that although NEPA does require the NRC to consider new and significant information regarding environmental impacts, "NEPA does not require agencies to adopt any particular internal decisionmaking structure."[82] The court also noted the availability of nonadjudicatory "channels" through which the NRC may receive putative "new

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77 *Id.* (citing CLI-07-3, 65 NRC at 21).

78 *Id.* (JA222) (citing CLI-07-3, 65 NRC at 19-21).

79 *Massachusetts v. United States*, 522 F.3d 115, 127 (1st Cir. 2008).

80 *Id.* at 127 (citations omitted).

81 *Id.*

82 *Id.* (quoting *Balt. Gas & Elec. Co.*, 462 U.S. at 100).

and significant information," including a license renewal applicant's environmental report, public comments on a draft supplemental EIS, and rulemaking petitions.[83]

There are no material distinctions between the circumstances of this case and the *Pilgrim* and *Vermont Yankee* circumstances addressed by the licensing boards, the Commission and, finally, the First Circuit in *Massachusetts v. United States*, 522 F.3d 115 (1st Cir. 2008).[84] The Commission correctly concluded that the proper procedural avenue for NRDC to litigate alleged "new and significant information" was to seek a waiver of section 51.53(c)(3)(ii)(L).[85] Alternatively, as the Commission noted, NRDC could have filed a petition for rulemaking under 10 C.F.R. § 2.802 to rescind the SAMA analysis exception in section 51.53(c)(3)(ii)(L), or submit comments on the draft supplemental EIS.[86]

In summary, the NRC reasonably and correctly concluded that section 51.53(c)(3)(ii)(L) precludes the need for a supplemental SAMA analysis in this case, and that NRDC improperly sought to challenge that generic rule. Those conclusions are consistent with the plain language and regulatory history of section

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83 *Id.*

84 *Id.*

85 *Limerick*, CLI-12-19, 76 NRC at 386 (JA224-25) (citing CLI-07-3, 65 NRC at 18 n.15, 20).

86 *See id.* at 387 (JA226) (citing 10 C.F.R. §§ 2.802(a), 51.73, 51.74).

51.53(c)(3)(ii)(L), as well as controlling administrative and persuasive judicial precedent.

## II. THE COMMISSION DID NOT ACT ARBITRARILY AND CAPRICIOUSLY IN DENYING NRDC'S WAIVER PETITION FOR FAILURE TO MEET THE REQUIREMENTS OF SECTION 2.335(b).

### A. *NRC's Waiver Standard Has Sound Legal and Policy Bases.*

The NRC's denial of NRDC's waiver petition in CLI-13-7 also is manifestly correct (and certainly not arbitrary or capricious). The NRC established its waiver standard, which "is stringent by design,"[87] over forty years ago "[i]n view of the expanding opportunities for participation in Commission rulemaking proceedings and increased emphasis on rulemaking proceedings as the appropriate forum for settling basic policy issues."[88] That rationale – still valid today – undergirds the ruling in CLI-13-7, wherein the NRC noted its unquestioned discretion to "carv[e] out" issues from adjudication and to resolve them generically by rulemaking.[89]

That bedrock principle of administrative law explains the Commission's logical focus on the "uniqueness" factor of its waiver standard in CLI-13-7.

> [I]n general, challenges to regulations are best evaluated through generic means. Only where a particular challenge to a regulation rests on issues that are legitimately *unique* to the proceeding and do not

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87 *Limerick*, CLI-13-7, 78 NRC at 207 (JA381).

88 *Id.* at 207 n.32 (JA381) (quoting Restructuring of Facility License Application Review and Hearing Processes, 37 Fed. Reg. 15,127, 15,129 (July 28, 1972)).

89 *Id.* at 207 (JA381) (quoting *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 596 (1988)).

> imply broader concerns about the rule's general viability or appropriateness would it make sense to resolve the matter through site-specific adjudication.[90]

### B. *The NRC's Application of Its Waiver Standard Was Well Reasoned and Rational.*

Based on the record before it, the NRC appropriately concluded that NRDC failed to meet its burden to demonstrate the existence of "special" or "legitimately unique" circumstances with respect to Limerick.[91] NRDC suggests that the sheer passage of time means that the 1989 SAMDA analysis is outdated, and that "new and significant information" exists. NRDC Br. 36.

Even "viewing NRDC's waiver petition and supporting documentation in the light most favorable to NRDC,"[92] the NRC found that NRDC failed to explain "how the information it provides sets Limerick apart from other plants undergoing license renewal whose previous SAMA analyses purportedly also would be in need of updating."[93] The Commission aptly observed that "updated" information

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[90] *Id.* at 208 (JA383) (emphasis added) (citations omitted). The First Circuit recently approved NRC's application of the "uniqueness" criterion in affirming its denial of a waiver request. *See Massachusetts v. NRC*, 708 F.3d at 74. There, Massachusetts sought a waiver to challenge a Category 1 spent fuel pool issue in the *Pilgrim* license renewal proceeding. *See id.* The court held that "the NRC permissibly reasoned that Massachusetts did not show that the spent fuel pool issues in its contention were unique to Pilgrim," and that those issues "would be more appropriately handled through rulemaking." *Id.*

[91] *Limerick*, CLI-13-7, 78 NRC at 207-08 (JA382-83).

[92] *Id.* at 213 n.77 (JA391).

[93] *Id.* at 215 (JA393).

similar to that cited by NRDC could always be alleged with respect to other plants that qualify for the SAMA-analysis exception, including the Comanche Peak and Watts Bar plants cited in the 1996 Part 51 rulemaking, and new plants licensed under 10 C.F.R. Part 52.[94] Upon seeking renewal of their licenses, such plants would "face the same criticism: essentially, that the passage of time between original licensing and renewal has rendered their SAMA analysis out-of-date."[95]

Although the Commission's holding is rooted firmly in settled tenets of administrative law, the Commission did not render its decision in a legal or procedural vacuum. Rather, as noted above, it also probed the policy and technical rationales underlying section 51.53(c)(3)(ii)(L), reaffirming that the regulation reflects its previous determination that one SAMA analysis satisfies the NRC's NEPA obligation to consider severe accident mitigation measures.[96]

On this point, it may be useful to emphasize that SAMA analyses performed to comply with NEPA do not constitute the NRC's sole look at severe accident mitigation. As discussed in the Final Supplemental EIS for Limerick license renewal, the NRC continually evaluates severe accidents and ways to mitigate their

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94 *Id.* (JA394).

95 *Id.* at 214 (JA392).

96 *See id.* at 210 (JA385-86) (discussing the Commission's review of the regulatory history of section 51.53(c)(3)(ii)(L)).

impacts.[97] The NRC's regulatory responses to the September 11, 2001 terrorist attacks and March 2011 Fukushima accident – which have resulted in licensee implementation of additional mitigation measures – are prime examples. The NRC staff also has undertaken sophisticated technical studies, such as the agency's State-of-the-Art Reactor Consequence Analyses study and full-scope site Level 3 probabilistic risk assessment project.[98]

## III. NRDC HAS NO AUTOMATIC "RIGHT TO A HEARING" ON AN ISSUE MATERIAL TO THE NRC'S LICENSE RENEWAL DECISION.

### A. *There Is No Absolute Right to a Hearing Under the AEA, APA, or NEPA.*

Much of NRDC's argument on appeal rests upon an incorrect premise: namely, that the NRC denied NRDC the purported "right to a hearing" on a material licensing issue, in contravention of the AEA, NEPA, and the APA. NRDC Br. 25-33. No such right exists.

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97 *See generally*, Final Supplemental EIS, vol. 1 at 5-3 to 5-9 (JA677-83). For example, the NRC's post-Fukushima actions have included the creation of a Task Force to study the accident's regulatory implications and make appropriate recommendations for bolstering the NRC's regulatory framework. In March 2013, NRC issued several orders to licensees implementing certain Task Force recommendations related to containment, core cooling, and spent fuel pool cooling capabilities. *See id.* at 5-7 to 5-8 (JA681-82).

98 *See* United States Nuclear Regulatory Commission, State-of-the-Art Reactor Consequence Analyses (SOARCA) (Mar. 30, 2015), http://www.nrc.gov/about-nrc/regulatory/research/soar.html; NRC Risk-Informed Activities, Full-Scope Site Level 3 Probabilistic Risk Assessment Project (Sept. 2014), http://pbadupws.nrc.gov/docs/ML1429/ML14295A227.pdf.

With respect to AEA, forty years ago, in *BPI v. Atomic Energy Commission*, 502 F.2d 424 (D.C. Cir. 1974), this Court affirmed the legality of the NRC's intervention rules, rejecting the position now taken by NRDC; viz., that NRC "must" grant a hearing on all material issues.

> Section 189(a) [of the AEA] does not in literal terms state that any person whose interest is affected may intervene .... *The statute does not confer the automatic right of intervention upon anyone*. Under its procedural regulations it is not unreasonable for the Commission to require that the prospective intervenor first specify the basis for his request for a hearing.[99]

The Court applied this holding in subsequent cases arising from contested NRC adjudications. In *UCS I*, 735 F.2d 1437, the Court held that the NRC had exceeded its statutory authority under AEA section 189(a) by adopting a rule that categorically excluded the results of emergency preparedness exercises – a "material public safety-related factor" integral to the NRC's licensing decision – from *all* NRC licensing hearings.[100] Importantly, however, the Court clarified that "the only central requirement is that there be an *opportunity* to dispute issues raised by the exercises under the relevant decisionmaking criteria."[101]

In *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 55 (D.C. Cir. 1990) ("*UCS II*"), the Court revisited this issue. There, the petitioner, not unlike NRDC

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[99] *BPI*, 502 F.2d at 428 (emphasis added).

[100] *See generally UCS I*, 735 F.2d at 1444-47.

[101] *Id.* at 1449 (emphasis added).

here, alleged that the NRC's contention admissibility standards violated the AEA, APA, and NEPA.[102] This Court flatly disagreed, explaining that "*UCS I* does not establish … that *any* party raising a material issue has a right to intervene," but "only that the NRC may not preclude *all* parties from raising a specified material issue."[103] The Court further stated that "we have long recognized that Section 189(a) 'does not confer the automatic right of intervention upon anyone.'"[104]

With respect to NEPA, as the Commission correctly observed, that statute also confers no "right" to a hearing.[105] In *UCS II*, the Court stated:

> While NEPA clearly mandates that an agency fully consider environmental issues, *it does not itself provide for a hearing on those issues*. As a result, *NEPA does not alter the procedures agencies may employ in conducting public hearings*; it instead merely prevents agencies from excluding *as immaterial* certain environmental issues from those hearings. The NRC has not attempted to do this, and as its procedural rules do not facially violate the Atomic Energy Act or the APA, they also are consistent with NEPA.[106]

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[102] *See UCS II*, 920 F.2d at 51-52.

[103] *Id.* at 54-55.

[104] *Id.* at 55 (quoting *BPI*, 502 F.2d at 428); *see also Nuclear Info. Research Serv. v. NRC*, 969 F.2d 1169, 1174 (D.C. Cir. 1992) ("*UCS I* did not require *every* hearing in the licensing process to encompass *every* material issue of fact.").

[105] *Limerick*, CLI-13-7, 78 NRC at 211 (JA358) ("But our rules do not guarantee a hearing; nor is a hearing necessary to satisfy our NEPA obligations.") (citations omitted).

[106] *UCS II*, 920 F.2d at 56-57 (emphasis added) (internal citations omitted). Also relevant here, the Court rejected the argument that *UCS I* requires a licensing hearing to "embrace anything new" identified in connection with the NRC's environmental review, *id.* at 55, and noted that "whether an actual new 'issue'

This court's sister circuits, not surprisingly, have reached similar conclusions.[107]

And, similarly, the Commission's reasonable application of its waiver standard does not contravene APA requirements. As this Court has recognized, the APA does not establish a substantive right to a hearing; instead, it specifies minimum procedures for hearings when a statute or other legal authority mandates a hearing opportunity.[108] "The APA lays out only the most skeletal framework for conducting agency adjudications, leaving broad discretion to the affected agencies in formulating detailed procedural rules."[109] That discretion is particularly broad with respect to "operating procedures, which are uniquely within the expertise of the agency."[110] So, again, the Court's holdings in *BPI* and *UCS II* control here, and

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is raised is a matter for the NRC to determine in the first instance and is reviewed deferentially." *Id.*

107 *See*, *e.g.*, *Brodsky v. NRC*, 704 F.3d 113, 120 (2d Cir. 2013) (no requirement for hearings on NEPA issues); *Beyond Nuclear v. NRC*, 704 F.3d 12, 15 (1st Cir. 2013) ; *Del. Dep't of Natural Res. & Envtl. Control v. U.S. Army Corps of Eng'rs*, 685 F.3d 259, 270 (3d Cir. 2012); *San Luis Obispo Mothers for Peace v. NRC*, 635 F.3d 1109, 1115 (9th Cir. 2011); *Kelley v. Selin*, 42 F.3d 1501, 1512 (6th Cir. 1995).

108 *See Am. Trucking Ass'ns, Inc. v. United States*, 627 F.2d 1313, 1321 (D.C. Cir. 1980) ("The Administrative Procedure Act … prescribe[s] certain procedures that must be followed by the [agency]; beyond that, procedural regulations are generally within the discretion of the agency.").

109 *Citizen's Awareness Network, Inc. v. United States*, 391 F.3d 338, 349 (1st Cir. 2004) (citing *Am. Trucking Ass'ns*, 627 F.2d at 1321).

110 *Am. Trucking Ass'ns*, 627 F.2d at 1321 (citing *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143-44 (1940)).

compel the conclusion that the NRC acted lawfully and well within its discretion when it required NRDC to seek a waiver of section 51.53(c)(3)(ii)(L).

In summary, the precedent discussed above disposes of NRDC's argument that the NRC "must provide a hearing" on a NEPA-related issue material to its license renewal decision. NRDC Br. 25. There is no absolute right or "entitlement to a hearing" under the AEA, APA, or NEPA. NRDC Br. 42. Rather, the only "right" afforded is the one to seek a hearing in accordance with the NRC's judicially sanctioned hearing procedures.[111] NRDC must meet *all* NRC requirements for intervention, including obtaining a waiver for any regulation challenged by a proposed contention. NRDC has failed to do so here, and for that reason its petition must be denied.

### B. *There Was Nothing Unlawful About the Commission's Application of Its Regulatory Scheme.*

NRDC claims that the NRC "regulatory scheme" governing the disposition of its hearing request violates the AEA, NEPA, and APA, and should be held to be "invalid." NRDC Br. 47-49. Such an assertion is precluded to the extent that it was not asserted below,[112] and, if anything, underscores that the nature of NRDC's

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[111] Thus, the NRC has not attempted to "delimit the scope of this Court's jurisdiction." NRDC Br. 41 n.17. Rather, it has merely applied its own well-settled hearing procedures. Moreover, NRDC has not been denied rights to judicial review.

[112] *E.g., Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1290, 1297-98 (D.C. Cir. 2004) ("As a general rule, claims not presented to the agency may not be

real complaint would, if anything, be more amenable to a petition for rulemaking, not adjudication as pursued below and in this Court.

Moreover, the argument in any event erroneously assumes that NRC regulations, as applied in this case, "barred" or "precluded" NRDC from obtaining a hearing to which it had a right. NRDC Br. 4, 30. As explained above, that is simply not the case, any more so than it was for the petitioners in *Massachusetts v. United States*.[113] As the Commission noted, "section 2.335(b) provides *an avenue for a petitioner who seeks to litigate a contention in an adjudicatory proceeding* that otherwise would be outside the permissible scope of the proceeding"[114] The Commission's denial of NRDC's waiver petition did not preclude NRDC's right to *request* a hearing under the AEA or violate any related APA procedures. Rather, by failing to meet the NRC's waiver standard, NRDC merely failed to satisfy a threshold – and entirely permissible – procedural requirement for a hearing.

## IV. VACATUR OF THE RENEWED LIMERICK OPERATING LICENSES IS NOT AN APPROPRIATE REMEDY HERE.

NRDC asks this Court to "vacate" the renewed operating licenses pending a remand for the Commission to reconsider NRDC's hearing request on its SAMA

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made for the first time to a reviewing court.") (citation omitted); *Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 562 (D.C. Cir. 2002) ("[T]here is a near absolute bar against raising new issues – factual or legal – on appeal in the administrative context.") (citation omitted).

[113] 522 F.3d at 127.

[114] *Limerick*, CLI-12-19, 76 NRC at 387 (JA226) (emphasis added).

contentions. NRDC Br. 51. It claims that vacatur is the "presumptive remedy" and is necessary to ensure that NRDC obtains a "fair and meaningful hearing." NRDC Br. 51. NRDC's arguments, however, are incorrect, and not supported by the governing case law of this and other federal courts.

None of the cases cited by NRDC in support of its vacatur request are relevant here, but, rather, for the most part involve materially different circumstances and statutory schemes. Only one of the cases even involved NEPA at all, and that one is quite distinguishable, for reasons that include the fact that it arose from federal agencies' decisions to enter into a contract with an Indian tribe more than a year *before* the agencies performed the necessary NEPA review.[115] The court noted that its holding was "limited to the unusual facts and circumstances" of the case, where the defendants already had made an "irreversible and irretrievable commitment of resources" by entering into a contract before they had considered the environmental consequences under NEPA.[116] The court did not even reach the question of whether the belated environmental assessment was inadequate or not.[117] Here, by contrast, the NRC prepared a detailed environmental impact statement and record of decision before issuing the renewed licenses, and NRDC's appeal is all about the "adequacy" of those determinations.

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[115] *Metcalf v. Daley*, 214 F.3d 1135, 1145-46 (9th Cir. 2000).

[116] *Id.* at 1145.

[117] *Id*.

Contrary to NRDC's claim, vacatur is *not* the "presumptive remedy." Except in rare circumstances not presented here, the proper remedy is remand, particularly when the agency may ultimately justify its actions.[118] For example, in *Minnesota v. NRC*, 602 F.2d 412 (D.C. 1979), this Court, despite finding a NEPA violation, declined to vacate or stay the license amendment in question (which amended an operating license to expand spent fuel storage capacity), finding instead that the Commission was free to proceed with consideration of the effects of modifying the spent fuel storage capacity by such means as it might deem effective to that end.[119]

Similarly, in *Massachusetts v. NRC*, 708 F.3d 63 (1st Cir. 2013), this Court declined to vacate authorization of the Seabrook plant's operating licenses, despite remanding the case to the NRC for further explanation of an NRC Appeal Board's rejection of a late-filed emergency preparedness contention.[120] Noting that it was

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[118] *See Olsen v. United States*, 414 F.3d 144, 155 (1st Cir. 2005) (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)) ("In the event the administrative record is found inadequate for judicial review 'the proper, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'").

[119] *See Minnesota*, 602 F.2d at 418 ("We neither vacate nor stay the license amendments, which would effectively shut down the plants."); *see also York Comm. for a Safe Env't v. NRC*, 527 F.2d 812, 816 (D.C. Cir. 1975) (declining to vacate the Oyster Creek operating license despite remanding one NEPA-related issue to the NRC).

[120] *Massachusetts v. NRC*, 924 F.2d 311, 336 (D.C. Cir. 1991) (stating that "[i]n appropriate cases, we will remand without vacating an agency's order where

unable to conclude that the Appeal Board had properly considered the petitioners' rights under AEA Section 189 when it rejected their contention, the Court remanded the issue for "reasoned decisionmaking."[121] However, the Court found no "reason to disturb Seabrook's operating licenses."[122]

Accordingly, if the Court were to find that the NRC acted arbitrarily or capriciously in denying NRDC's waiver petition (which it should not do, for all of the reasons stated), then the appropriate remedy would be remand for further proceedings to ensure reasoned decisionmaking, not vacatur of the renewed licenses.[123]

## CONCLUSION

For all of these reasons, this Court should deny NRDC's petition for review.

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the reason for the remand is a lack of reasoned decisionmaking," and noting the need to consider the seriousness of the deficiency in the administrative action and the disruptive consequences of the court's decision).

[121] *Id.* at 337.

[122] *Id.*

[123] If the Court were to set aside the renewed licenses, then the previous licenses would be reinstated in accordance with 10 C.F.R. § 54.31(c). This underscores the fact that vacatur of the renewed licenses is not needed to avoid harm to NRDC, as plant operations would continue in parallel with any remand proceedings in either circumstance – vacatur or no vacatur.

Respectfully submitted,

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Dated: May 7, 2015

## CERTIFICATION OF COMPLIANCE

Pursuant to the Federal Rules of Appellate Procedure and the Local Rules of this Court, the undersigned counsel certifies:

The foregoing brief of Intervenor complies with Circuit Rule 32(a)(2)(B) because this Brief contains 8,736 words, excluding parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1), according to the Microsoft Office Word 2007 software program with which the Brief was prepared. The foregoing Brief complies with Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because it was prepared in proportionally spaced typeface in 14 point Times Roman font using Microsoft Office Word 2007.

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## CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2015, undersigned counsel for Exelon Generation Company, LLC filed the foregoing Final Brief for Intervenor with the U.S. Court of Appeals for the District of Columbia Circuit by filing the same with the Court's CM/ECF filing system. That method is calculated to serve:

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